

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)

v.)

Case No. 5:18-cr-15-1

RICHARD WHITCOMB,)

Defendant.)

**ORDER ON MOTION TO SUPPRESS
(Doc. 46)**

Defendant, Richard Whitcomb, has moved to suppress statements he made in the course of a police interview as well as the results of a search of his residence. On April 10, 2019, and May 15, 2019, the court conducted an evidentiary hearing. The parties filed post-judgment briefs and the motion was taken under advisement on June 12, 2019.

FACTS

The following facts are drawn from the parties' briefs and the testimony at the suppression hearings held on April 10, 2019 and on May 15, 2019.

Austin Colson was last seen alive on January 11, 2018. His family reported him missing on January 12, 2018. Trooper Christopher Blais, of the Vermont State Police (VSP), was assigned to investigate the missing person case. In assembling a list of family members and friends who might have information about Mr. Colson, Trooper Blais identified Defendant Richard Whitcomb as a potential source of information. Mr. Whitcomb and Mr. Colson often worked together as "scrappers" collecting waste metal for resale. They were also known to use drugs.

Beginning on January 12, 2018, Trooper Blais tried to contact Mr. Whitcomb by phone, by text, and by stopping at his home in White River Junction. Through Trooper Blais's efforts,

Mr. Whitcomb and his wife agreed to come to the Royalton State Police barracks to speak with detectives about Mr. Colson.

Mr. and Mrs. Whitcomb voluntarily drove their own car to the VSP barracks on January 16, 2018.¹ Mr. Whitcomb met with VSP Detectives Eric Albright and Richard Holden. The Detectives met Mr. Whitcomb in the public foyer and escorted him through a locked door into the main body of the barracks building. The door from the foyer is locked from the public side. The door is not locked from the inside.

The three men spoke for an hour and 20 minutes in a small room (about 10 x 15 feet) containing a table and three chairs. The interview room—labeled the “polygraph room”—is about 20 feet from the door opening into the foyer. During the interview, the detectives sat across from Mr. Whitcomb. The interview was audio and video recorded.

The detectives spoke in a calm, friendly manner. They thanked Mr. Whitcomb for agreeing to speak with them. They offered Mr. Whitcomb a drink of water at the beginning and mid-way through the interview. They told Mr. Whitcomb where the bathroom was and said he could leave at any time. The parties disagree about whether Mr. Colson was told he could leave to visit the bathroom or leave for any purpose. The detectives explained they were investigating the disappearance of his friend Mr. Colson.

Mr. Whitcomb told the detectives that he had last heard from Mr. Colson by text message on January 11, 2018. Mr. Whitcomb explained that he was a drug addict and that Mr. Colson was his supplier. He stated that he had provided a Colt semi-automatic handgun to Mr. Colson to hold as “collateral” for payment for drugs that Mr. Colson had provided him. He stated that at

¹ During his interview with the VSP detectives, Mr. Whitcomb confirms he came to the police barracks voluntarily. (Gov’t Ex. 2 at 4:24:09.)

his wife's insistence, he had recently decided to break off relations with his drug connections and associations and get a new phone. When asked for his phone, Mr. Whitcomb said his phone was "gone," and he did not have the new phone with him either.

In the course of the interview, the detectives engaged in a ruse. They advised Mr. Whitcomb that they had cell phone information and surveillance photos that showed him with Mr. Colson. These statements were untrue.

While Mr. Whitcomb was engaged in his interview, Detective Dion questioned Mrs. Whitcomb in a separate interview room that opened off the public foyer. At the conclusion of Mr. Whitcomb's interview, Mr. Whitcomb returned to the foyer and rejoined his wife.

After the interview, Detective Albright explained that the police needed to conduct a search to find the phone which Mr. Whitcomb had used to communicate with Mr. Colson. He explained that he could obtain consent to a search or hold Mr. Whitcomb in handcuffs until he could obtain a warrant.

Mr. Whitcomb first gave permission to conduct a body search, which revealed nothing of interest. Mrs. Whitcomb then gave written consent to a search of the couple's car, which also revealed nothing of interest. The detectives also requested an opportunity to search the Whitcomb residence. The Whitcombs agreed to return to their residence with the officers. The Whitcombs were permitted to leave the barracks and return in their own car. The detectives followed. The distance from the police barracks to the Whitcomb home was about a 25 minute drive.

Before leaving the barracks, Detective Albright called the Hartford Police Department and requested that officers go to the Whitcomb home to secure the scene before the Whitcombs and the detectives arrived. Hartford Police officers Karl Ebbighausen and Sean Fernandes

responded to the call. The officers arrived at the house and found it occupied by the Whitcomb's young teenage daughter, who permitted them to enter the house. While the officers were chatting with the girl in the front hall, Mrs. Whitcomb called her young teenage daughter. Officer Ebbighausen knew the family from a prior incident and offered to talk with Mrs. Whitcomb to explain why he was at the house. The girl passed the phone to Officer Ebbighausen. Officer Ebbighausen explained to Mrs. Whitcomb that he was in the house to make certain that the phone was not removed or tampered with. Mrs. Whitcomb told Officer Ebbighausen the phone was located in the couple's bedroom. Still talking over the phone, Mrs. Whitcomb guided the officer through the house, into the bedroom, and directly to the spot under the blankets and a pillow where the phone lay concealed. Officer Ebbighausen picked up the phone and took it back to the entrance hall where he placed it on a small wall shelf and waited for the VSP detectives to arrive.

While the officers waited for the Vermont State Police to arrive, the teenager's grandmother arrived to find out why the police were at the Whitcomb's residence. After some conversation, she left with her granddaughter. A few minutes later, the Whitcombs and the two VSP detectives pulled into the driveway.

Detective Albright spoke with Mrs. Whitcomb in front of the house. At first, she was upset and did not want to let the police into the house. Mrs. Whitcomb changed her mind and signed a written consent to search form after hearing it read aloud.

Mr. Whitcomb met with a Detective in his cruiser. Mr. Whitcomb also signed a written consent to search form. (Gov't Ex. 7.) Mr. Whitcomb explained that he was reluctant to turn over the Colt handgun because it belonged to his father-in-law and he was concerned that it might not be returned or could be damaged. After some discussion, he told the Detective where

the gun was located. The detectives seized the cell phone, other cell phones found in the residence, and the handgun.

In a Facebook conversation with Mr. Colson's mother and aunt on January 28, 2018, Mrs. Whitcomb stated that she gave the police her husband's cell phone and all other phones in the house voluntarily. (Gov't Ex. 11.)²

Mr. Colson's body was discovered several months later in Vermont.

ANALYSIS

Mr. Whitcomb challenges the constitutionality of the police interview because he claims he was in custody but not read his *Miranda* rights. Additionally, Mr. Whitcomb argues he did not voluntarily waive his rights. Mr. Whitcomb also challenges the constitutionality of the police entering and searching his residence.

I. Suppression under *Miranda*

The court first considers the lawfulness of the interview. "A person questioned by law enforcement officers after being 'taken into custody or otherwise deprived of his freedom of action in any significant way' must first 'be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal citations omitted). This requirement is commonly referred to as a *Miranda*

² The court admitted the hearsay string of Facebook posts because the statements by Mrs. Whitcomb were consistent with her signature on the card giving consent to search her home as well as the description of the events of January 16, 2018, provided by the officers. The authenticity of the posts was established by testimony from the mother and aunt, who are related to Mrs. Whitcomb and have communicated with her before through Facebook. The content of the posts also corroborates their authenticity because they describe the police visit to the home and the search for the phones in particular. These were matters about which Mrs. Whitcomb had first-hand information and which are unlikely to be known to many others.

warning. Any statements “elicited in noncompliance with this rule may not be admitted for certain purposes in a criminal trial.” *Id.* Notably, an “officer’s obligation to administer *Miranda* warnings attaches . . . only where there has been such a restriction on a person’s freedom as to render him in custody.” *Id.* To determine if an individual was in custody, the “court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a ‘formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.’” *Id.*

Mr. Whitcomb was neither taken into custody nor significantly deprived of his freedom of movement. In fact, Mr. Whitcomb’s freedom was not restricted in any way. Mr. Whitcomb voluntarily drove to the police barracks, in his own car with his wife. While the interview did occur at the police barracks, the Supreme Court has consistently held, “*Miranda* warnings are not required simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.” *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (internal citations and quotations omitted). Mr. Whitcomb was not physically restrained or arrested. Mr. Whitcomb was taken into an interview room that was not unduly restrictive. The police informed Mr. Whitcomb he was free to leave. The court interprets the statement that Mr. Whitcomb could leave as granting him permission to leave the interview room at any time. There were no locks on the interview room door or the doors leading back to the public foyer or exit. Nothing in the record suggests the police used threatening or abusive behavior. Any ruse the detectives engaged in while interviewing Mr. Colson “has nothing to do with whether [Mr. Whitcomb] was in custody for purposes of the *Miranda* rule.” *Oregon v. Mathiason*, 429 U.S. 492, 495–96 (1977). Mr. Whitcomb eventually told the detectives that he wanted to go back and

see his wife, which demonstrates that he knew he was free to leave. Soon after, Mr. Whitcomb returned to the foyer and rejoined his wife.

In *Beheler*, which involves facts similar to this case, the Supreme Court held that *Miranda* warnings were not required where the defendant, a crime suspect, voluntarily came to the police station, was allowed to leave after his interview, and was not placed under arrest. *Beheler*, 463 U.S. at 1121–22. The *Beheler* Court emphasized the Court’s previous holding in *Mathiason* that a “noncustodial situation is not converted to one in which *Miranda* applies simply because . . . the questioning took place in a coercive environment.” *Id.* at 1124. The Court reasoned any police interview has coercive aspects “simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.” *Id.*

Based on the surrounding circumstances, Mr. Whitcomb was not was not in custody when interviewed by the VSP Detectives. For this reason, *Miranda* warnings were not required. *Mathiason*, 429 U.S. at 494 (“*Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’”) The interview was lawful and does not provide a basis for exclusion of evidence.

II. Voluntariness of the Entry and Search of the Residence

Next, the court will consider the lawfulness of the entry and search of Mr. Whitcomb’s residence.

A. Entry

Generally, a warrantless entry into a home is unlawful. *Steagald v. United States*, 451 U.S. 204 (1981). However, the Supreme Court has consistently recognized two instances when

police officers may enter a house without a warrant (1) in the case of exigent circumstances or (2) when consent is given. *Id.* at 212.

In this case, Detective Albright called the Hartford Police Department and requested that officers go to the Whitcomb residence to secure the scene before the Whitcombs and the Detectives arrived. Officers Karl Ebbighausen and Sean Fernandes responded to the call. When they arrived at the Whitcomb residence they found it occupied by the Whitcomb's teenage daughter. The daughter allowed the officers to enter the Whitcombs' home. Nothing in the record indicates the daughter did not have the authority to consent to the entry. Further, "even if [the daughter] did not in fact have authority to give consent, it suffices to validate the entry that the law enforcement officers reasonably believed she did." *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990). Here, it is reasonable to conclude that the teenage daughter had the authority to allow the officers to enter the house since she was old enough to remain at home alone.

Thus, the officers' entry into the Whitcomb's home did not violate the Fourth Amendment as they had consent to enter. The entry was lawful and does not provide a basis for exclusion of evidence.

B. Search

Mr. Whitcomb also argues the consent to search his home was not voluntary because the request for consent occurred after the Detectives questioned him, because he was in a police-controlled environment when asked, and because consent was sought after they informed him that he would be detained if he did not consent.

It is well-established that the Fourth Amendment prohibits unreasonable searches and seizures. *United States v. Zaleski*, 559 F. Supp. 2d 178, 185 (D. Conn. 2008). "It is basic Fourth Amendment jurisprudence that when the Government seeks to intrude upon an individual's

legitimate expectations of privacy, it must either obtain a warrant from a neutral magistrate or bring its search within one of the few ‘jealously and carefully drawn’ exceptions to the warrant requirement.” *United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2d Cir. 1981) (citing *Jones v. United States*, 357 U.S. 493, 499 (1958)). “[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Generally, “[t]he Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect’s consent permitted him to [conduct the search that was undertaken].” *Seifert v. Rivera*, 933 F. Supp. 2d 307, 315–16 (D. Conn. 2013) (internal citations omitted).

In this case, Officer Ebbighausen spoke with Mrs. Whitcomb over the phone while in the Whitcomb’s residence. During the phone call, Officer Ebbighausen explained to her that he was in the house to make sure the phone was not removed or tampered with before the VSP detectives arrived. Mrs. Whitcomb told Officer Ebbighausen the phone was in the couple’s bedroom. Over the phone, she guided Officer Ebbighausen to the exact location of the phone which was on the couple’s bed under the blankets and partly under a pillow.

Mrs. Whitcomb voluntarily consented to the search of the phone when she guided Officer Ebbighausen through her home to the phone. Under the circumstances, it was objectively reasonable for Officer Ebbighausen to believe that Mrs. Whitcomb had consented to his search and retrieval of the phone from the bed. When Officer Ebbighausen located the phone, through her direction, he placed the phone on a small wall shelf in the entrance hall of the residence. Officer Ebbighausen waited with the phone until the VSP detectives arrived.

Soon after, the VSP Detectives conducted a broader search for the gun and other phones. Both Mr. and Mrs. Whitcomb consented to this broader search. Mrs. Whitcomb signed a written consent form after the police read it to her out loud.³ (Gov't Ex.7.) Mr. Whitcomb also voluntarily signed a written consent form allowing the broader search. (*Id.*) Nothing in the record suggests that the Whitcomb consent was "coerced by explicit or implicit means." *Bustamonte*, 412 U.S. at 228.

Mr. Whitcomb argues that his consent was not voluntary because he was interviewed prior to being asked for consent and because he was in a police-controlled environment when asked. But, Mr. Whitcomb was asked while both at the police barracks and subsequently while he was at home to consent to the search. Mr. Whitcomb claims his consent was not voluntary because he was informed that the police would attempt to obtain a search warrant if he did not consent. Trooper Hughes believed if he did not receive consent to search the Whitcomb's home he could obtain a search warrant. Simply because the police informed Mr. Whitcomb of what would occur if he did not consent does not make his consent involuntary. *United States v. Calvente*, 722 F.2d 1019, 1023 (2d Cir. 1983) (holding that truthfully informing a property owner that, without consent, a search warrant could be sought did not negate the voluntariness of the consent); *see also United States v. Lopez*, 752 F. Supp. 616, 619 (S.D.N.Y. 1990) ("Moreover, under the law of this Circuit, a statement of intent to get a warrant does not, in itself, vitiate consent.")

Thus, both searches were voluntarily consented to. The searches were lawful and do not provide a basis for exclusion of evidence.

³ The Whitcombs' voluntary consent is corroborated by Mrs. Whitcomb's Facebook conversation with Mr. Colson's mother and aunt where Mrs. Whitcomb indicated that she gave the police Mr. Whitcomb's cell phone and all other phones in the house voluntarily.

CONCLUSION

For the reasons stated above, Defendant's Motion to Suppress Statements and Evidence (Doc. 46) is DENIED.

Dated at Rutland, in the District of Vermont, this 24 day of June, 2019.



Geoffrey W. Crawford, Chief Judge
United States District Court